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No. 91-453

In the Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS

Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Carol Korade, City Attorney
City of Alameda
2263 Santa Clara Avenue
Room 314
Alameda, California 94501
(415) 748-4500

(List of Counsel Continued Inside)

Katherine E. Stone *
Philip A. Seymour
Freilich, Stone, Leitner & Carlisle
11755 Wilshire Boulevard,
Suite 1230
Los Angeles, California 90025
(310) 444-7805

* *Counsel of Record for the Amici Curiae*

Westside Law Publishers Los Angeles, California (310) 207-0272

54

LIST OF AMICI CONTINUED

Jack L. White, City Attorney
Eleanor M. Egan, Senior Assistant City Attorney
City of Anaheim

Judy Skousen, City Attorney
City of Arroyo Grande

Robin D. Faisant, City Attorney
City of Atherton

Gary T. Ragghianti, City Attorney
City of Belvedere

Manuela Albuquerque
City Attorney
Thomas B. Brown, Deputy City Attorney
City of Berkeley

F. Thomas Caporael,
City Attorney
City of Calimesa

Richard M. Manning, City Attorney
City of Capitola

Ronald R. Ball, Acting City Attorney
City of Carlsbad

Jimmy L. Gutierrez, City Attorney
City of Chino

Bruce M. Boogaard, City Attorney
City of Chula Vista

Leland D. Stephenson, City Attorney
City of Clovis

Jimmy L. Gutierrez, City Attorney
City of Coachella

William Camil, City Attorney
City of Commerce

Thomas A. Kathe, City Attorney
City of Costa Mesa

Robert Wellington, City Attorney
City of Del Rey Oaks

Daniel T. McCloskey, City Attorney
City of Dinuba

Allen E. Sprague,
City Attorney
City of Fremont

Scott H. Howard, City Attorney
City of Glendale

Roger Picquet, City Attorney
City of Grover City

Gail C. Hutton, City Attorney
Joseph Barron, Deputy City Attorney
City of Huntington Beach

David J. Erwin, City Attorney
City of Indio

Leland D. Stephenson, City Attorney
City of Kingsburg

Charles J. Williams, City Attorney
City of Lafayette

John Calhoun, City Attorney
City of Long Beach

Robert K. Booth, Jr., City Attorney
City of Los Altos

James K. Hahn, City Attorney
Anthony S. Alperin, Assistant City Attorney
City of Los Angeles

Robert Wellington, City Attorney
City of Marina

M. Dwain Smith, City Attorney
City of McFarland

Leland H. Jordan, City Attorney
City of Mill Valley

(LIST OF AMICI CONTINUED ON BACK INSIDE COVER)

AMICI CURIAE WILL ADDRESS THE FOLLOWING QUESTIONS:

1. Whether the State's actions come within the nuisance exception to the takings clause, and
2. Whether the State's actions amounted to a taking if it is determined that the location of the interim development setback line on Lucas' property was inappropriate.

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BRIEF OF CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici cities and counties, political subdivisions of the State of California, file this brief pursuant to Rules of the Supreme Court of the United States Rule 37. *Amici* have a vital interest in the legal issues presented by this case which affect the powers and responsibilities of state and local governments to regulate land use to prevent public harm. *Amici* have responsibilities for implementing state and federal legislation designed to protect lives and property — from hazards of flooding, earthquakes and as in this case, ocean waves.

Many cities and counties contain properties on which the values of common prudence and the desire to build are in direct conflict. California cities and counties in particular are likely to host steep, geologically unstable hillsides, beaches and ocean bluffs, earthquake faults and brush choked canyons whose natural cycles involve a major wild fire every 20 to 30 years. In other areas of the country natural flooding or unstable soils may pose similar obstacles to development. These obstacles do not necessarily discourage an owner's desire to build. Indeed, many potentially unstable sites, such as oceanfront or hillside land may be valued at a premium due to their views, privacy or other factors.

Whereas many buyers might fear the risks associated with such property, there will always be many who do not fear to tread, and are often willing to pay a premium for the opportunity. Often they will be encouraged by salesman, brokers or developers who can produce experts willing to dispute the local government's judgment that development

on the site is imprudent. Often enough there are grounds for legitimate scientific debate or disagreement, and the only thing that is certain is uncertainty.

If the government allows development in such situations, it is likely to be sued when things later go wrong. If it takes steps to forbid such development, it will be faced with claims like the one in this case. The only infallible judge in such situations is nature herself, and the verdict can be rendered only by the passage of time.

Amici would like to know how far they may go in regulating unsafe development; whether they may enact temporary — or permanent — bans on potentially unsafe development; and whether they may err on the side of public health and safety, without exposing themselves to ruinous claims of damages by individual property owners. The fiscal realities of local government do not permit health and safety regulation to proceed on a parcel by parcel basis. The choice presented to local governments may thus well be that of accepting substantial financial risks, or not regulating at all.

Amici submit that the decision of the South Carolina Supreme Court is correct. Because this Court's decision will have a direct effect on matters of grave importance to *Amici*, *Amici* respectfully submit this brief to assist the Court in the resolution of this case.

STATEMENT OF THE CASE AND THE FACTS

Amici adopt respondent's statement of the case and the facts.

SUMMARY OF ARGUMENT

The Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Fifth Amendment does not guarantee the right to develop property for use which is unsafe, inconsistent with natural limitations on such use, or which exposes people to a significant risk of harm. Neither does the Fifth Amendment require the government to pay private property owners when government legislates to prevent such use. The South Carolina State Legislature found it necessary to restrict the building of permanent structures intended for human occupation in unstable coastal areas. The State Legislature's findings were not contested. Why then should the State of South Carolina be required to buy this property in order to prevent Lucas from using his property in a manner determined inherently unsafe and potentially damaging to himself and to others?

This case is not about whether government is immune from takings liability whenever its regulations advance *any* legitimate public purpose. This case is about (1) whether in order to prevent property owners from developing their land in a manner that exposes themselves and others to a significant risk of harm, the government must buy it; and (2) who is entitled to determine what uses of property pose a sufficient risk of harm that they should be prohibited — the courts or the legislatures.

The statewide regulations are not challenged in this case, nor is the methodology for establishing the interim setback line on Lucas' property. The state legislation provides remedies which enabled Lucas to receive a

development permit upon his success in the trial court, and also (as of June 1990) by administrative application. There appears no question that if the property can in fact be safely developed, Lucas will be able to fully achieve his original "investment backed expectations." Under these circumstances, *Amici* believe that the Court cannot find that the State's actions constitute a "taking," permanent or temporary.

ARGUMENT

I.

THE STATE'S ACTIONS COME WITHIN THE SO-CALLED "NUISANCE EXCEPTION" TO THE TAKINGS CLAUSE

A. The Question Presented Is Whether The State May Prohibit Unsafe Development On Property Subject To Substantial Natural Hazards, Not Whether The Government May Appropriate Private Property For The Public Or Prohibit All Use Of Property.

The question presented in this case is whether the "nuisance exception" authorizes the government to prohibit, in a proper case, the building of permanent structures on certain property, without paying compensation. Petitioner essentially asks this Court to recognize an *exception* to the "nuisance exception," and to hold that there exists an absolute right to place permanent structures on property, regardless of the potential risks of harm.

1. The State Interest In Question Is the Prevention of Unsafe Use of Property.

Contrary to petitioner's framing of the issue, no one contends that *any* legitimate public purpose may justify the relatively drastic use restrictions at issue. This is purely a straw man. The South Carolina Supreme Court quite clearly articulated that the basis for its decision was the "nuisance exception" recognized in prior decisions of this Court.

This is also not a case about public benefits accrued at the cost of private property rights. It is about a building restriction imposed primarily to protect public safety, above all that of petitioner, his family and future owners of the subject property.

To be sure, the legislative purposes articulated and served by South Carolina's coastal act are broad. It may also be true that the public will coincidentally benefit from better views or a wider beach as a result. Nevertheless, the primary function of the particular regulation at issue here must be viewed simply as prevention of unsafe development. The legislative findings accompanying the act specifically note that, "Consequently, without adequate controls, development unwisely has been sited too close to the [beach/dune] system." App. 99, § 48-39-250(4). The state legislature also found that efforts to protect such development through artificial means have proven ineffective, and have in many cases increased the danger of wave damage both to the owners and others. App. 99, § 48-39-250(5). The legislature concluded that it was in both "public *and private* interests" to preclude further development within the area subject to natural beach erosion. App. 99-100, § 48-39-250(6). Section 48-39-260(1)(a) also declares preservation of the

beach/dune system is necessary, *inter alia*, for "protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion." App. 102.

The setback line, seaward of which development may not take place, is calculated by estimating 40 years worth of erosion, or imposing a minimum setback of 20 feet from the existing baseline. App. 110-114, § 48-39-280. The minimum 20 foot setback is premised on the not unreasonable assumption (in fact, a well documented fact) that storm conditions may produce erosion well beyond the highwater mark. It can be argued that this approach is cautious with respect to properties such as Lucas'. Nevertheless, the clear intent is to prevent development in the "buffer zone," *i.e.*, precisely where it is exposed to damage from the ocean, whether by direct wave attack, the undermining of foundations by sand erosion, or other means.

Nothing in the State's regulations purports to grant the public an interest in the lands so restricted, or otherwise alter their ownership status. The setback regulations do serve to limit potential public harm. The legislature found that improperly sited development may actually increase danger to other properties, and aggravate the problems of beach erosion, and resulting damage to public and private resources. App. 99, § 48-39-250(4). The regulations prevent development where it is likely to become a hazard to its neighbors. The restrictions also serve to limit the amount of community-wide damage which may be sustained in a natural disaster, thus reducing the chances of overload and breakdown of public rescue, relief and rehabilitative resources. However, the most important effect is to prevent the owner himself from becoming a victim.

2. The Sole Attribute of Ownership Actually Affected by the Regulations is the Right to Develop the Property for Permanent Structures Intended for Human Occupation.

Although the restrictions placed on development of petitioner's land are severe, it must be acknowledged that they affect only one fundamental attribute of ownership — the right to develop for a particular *use*. Petitioner retains full ownership of the property and the right to exclude others. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). There has been no physical invasion or appropriation of plaintiff's land. *Cf. Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987). Petitioner retains the right to sell or bequeath the property. *Cf. Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

As to *use*, the right to build permanent structures was foreclosed. Even that absolute prohibition was temporary, however, as the State amended its regulations in June 1990 to permit owners in Lucas' position to apply for development permits under specified restrictions. App. 125, § 48-39-290(D). Before that, a judicial remedy was available if the regulations were unreasonably applied. Even during the temporary prohibition petitioner retained the full right to use his property for the most traditional use of land in its class, *i.e.*, beachfront recreation. The "taking," if any, results only from the State's interference with the "right" to build on the land. Whether there is any absolute "right to build," and whether denial of this particular "property right" necessarily amounts to a taking, are the issues presented.

B. The State Is Not Required To Compensate Private Property Owners For Protecting Their Safety Or Preventing Serious Public Harm.

1. Yes, There Is a "Nuisance Exception".

Petitioner suggests that there is in fact no "nuisance exception" to the Fifth Amendment's compensation requirement, and that the "nuisance exception," by virtue of its historical origins, properly applies only in cases involving alleged due process violations. Past decisions of this Court do not support this contention. Certainly this Court recently found the "nuisance" rule alive and well in *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470 (1987). The majority in *Keystone* would have immunized the challenged regulations from takings liability under the nuisance exception. *Id.* at 489-492. The four dissenting justices did not question the existence of a "nuisance" rule: "We have recognized that a taking does not occur where the government exercises its *unquestioned authority* to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Id.* at 511, emphasis added (Rehnquist, dissenting). Rather the dissent believed that the regulations at issue went beyond the scope of the "nuisance" exception as previously interpreted by this Court, and would have analyzed the challenged regulations under a traditional balancing test. *Id.* at 512.

In *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court similarly gave recognition to the nuisance exception by specifically reserving to the state court the question of "whether the county might avoid the conclusion that a

compensable taking had occurred by establishing that the denial of all use was *insulated as a part of the State's authority to enact safety regulations*." *Id.* at 313, emphasis added.[1] In view of these recent statements by this Court, the virtually universal recognition of the "nuisance" rule by state and the lower federal courts need not be belabored.

2. A Prohibition on Unsafe or Unreasonable Use of Property Falls Within the Constitutional Principles Associated With the Nuisance Exception.

In the context of this case the term "nuisance exception" may be misleading. A "nuisance" is often defined as an activity or use of property which unreasonably interferes with the use and enjoyment of the property (public or private) of others. *See* California Civil Code § 3479. For Fifth Amendment purposes, however, it is clear that the "nuisance exception" is not coterminous with the common law notion of nuisance, but extends to any activities deemed unreasonably harmful to the public. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887); *Miller v. Schoene*, 276 U.S. 272, 279 (1928); *Lawton v. Steele*, 152 U.S. 133 (1894).

It is also clear that the constitutional notion of "nuisance" extends to activities that are dangerous or unhealthful to the landowner himself, regardless of whether

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[1]The state court on remand concluded that the moratorium in that case was necessary to prevent harm to people and property. *First English Evangelical Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 1363 (1989), *cert. denied*, 493 U.S. 1056.

this harm may be extended to the general public.[2] This Court has never suggested that a landowner may freely engage in hazardous or illegal activities, violate building codes or ignore health laws simply on a showing that any ill effects will be confined to the premises. Thus an unsafe building may be condemned, and it is constitutionally irrelevant that the owner lacks the resources to replace the structure with a new one. *E.g., MacLeod v. City of Takoma Park*, 257 Md. 477, 263 A.2d 581, 584 (Md. 1970). The same power must necessarily extend to the prohibition of structures which are deemed inherently unsafe due to natural hazards or conditions.

[2]Petitioner suggests that regulation directed primarily at protecting the owner from his own folly smacks of paternalism, and, on the scale of constitutional values, cannot be used to justify a prohibition on development. This argument reduces itself to the absurd proposition that the public, through its government, must pay the individual for the privilege of preventing him from building his home where the roof may collapse on his family, or that of a subsequent purchaser, during the next storm, earthquake or other natural calamity. Despite this nation's deep rooted attachment to individual freedoms, it has not been found unconstitutional to deny the individual the right to inflict potential harm upon him or herself through the pursuit of hazardous activities, the personal use of drugs, impure water or food, experimental medicines or even alcoholic beverages. The Fifth Amendment does not carve out a special "property rights exception" for human folly.

3. No Compensation Is Required Where the Government Restricts Unsafe Development Because Such Action Does Not Result in Denial of Any Actual Property Right Protected by the Constitution.

The "nuisance exception" is best understood as not an "exception" to general rules, but rather as integral to the Fifth Amendment concept of a "taking of property". The government is not required to pay "just compensation" for a prohibition on unsafe or unreasonable uses of land because by prohibiting such uses, it has not deprived the owner of any property right or reasonable expectation which was his to begin with.

a. The reach of the Fifth Amendment is limited to government action which denies legitimate property rights.

The Fifth Amendment does not provide an all-purpose cure for perceived inequities of governmental regulation. By its express terms, the Amendment requires compensation only where private "*property*" is taken "*for public use*". The Takings Clause was originally interpreted — probably exactly as the original framers intended — quite literally. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 12 Wall. 457, 79 U.S. 475 (1870). As late as 1922 this Court held in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923), that the Takings Clause provided no relief for the "destruction," as opposed to appropriation, of private property.

With the rise of pervasive government regulation — an event likely unforeseen by the framers of the Fifth Amendment — this Court initially looked primarily to the due process clauses of the Fifth and Fourteenth Amendments for a constitutional remedy for excessive regulation. *See, e.g., Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Miller*, 276 U.S. 272, 280; *Hadacheck v. Sebastian*, 239 U.S. 394, 348 (1915).

Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Takings Clause has assumed a leading role in the protection of property rights. Indeed, this Court has given an expansive interpretation of the Takings Clause, holding that the essential principle is one of "fairness and justice" in allocating public and private burdens. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978); *see Armstrong*, 364 U.S. 40, 49 [Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"]. Nevertheless, the Fifth Amendment does not — as some appear to argue — invest the courts with an all-purpose equitable jurisdiction over the other branches of government. An indispensable element of any taking — regulatory or otherwise — is the damage or destruction of *property*, or, more precisely, with the "bundle of rights" associated with property ownership. Absent such an interference, there is no "taking." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984). Thus this Court has often "dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not

interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes." *Penn Central*, 438 U.S. 104, 124-125.

b. Property rights themselves are limited by concepts of reasonableness.

The Fifth Amendment also does not *create* property rights, nor unreasonable expectations based on ownership of property. *Webb's Fabulous Pharmacies*, 449 U.S. 155, 161. This Court has also long recognized that property rights are themselves creatures of law, and primarily state law at that. *Ruckelshaus*, 467 U.S. 986, 1001. To be protected, an owner's expectations must normally have "the force of the law behind them." Beyond this, however, the owner's expectations must be reasonable in view of the facts of nature and particular circumstances of his land.

c. The "nuisance exception" simply marks a limitation on the scope of "property rights" protected by the Fifth Amendment.

The essence of the "nuisance exception" is simply a recognition that the "bundle" of rights inhering from property ownership does not include the right to use property in a manner which is unsafe, hazardous, or injurious to others. "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Keystone*, 480 U.S. 470, 492, citing *Mugler*, 123 U.S. 623, 665. This exception does no more than recognize an inherent limitation on the notion of property itself. There is no inherent right to use property in a manner unreasonably injurious to others, or violative of basic safety

regulation. An individual cannot, by spending money, buy immunity from legislative judgments regarding basic questions of public and private safety and welfare.[3] Thus, by barring a nuisance or other unreasonable use of property, the government does not deprive the landowner of any property or other *right* he has ever possessed, and the property owner has therefore had nothing taken.

d. There is no constitutionally recognized property right to make an unreasonable or unsafe use of land.

A necessary consequence of the foregoing is that there is no absolute right to construct permanent improvements on unsuitable land. Certainly the right to use land is among the most important strands of a property owner's "bundle" of rights. Ordinarily this right would appear to include the right to make reasonable improvements on the land. But this right is subject to the "nuisance" limitation. The Constitution may proscribe excessive regulation, but it does not require the government to ignore the limitations placed on prudent development of property by nature.

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[3]*See Nollan*, 483 U.S. 825, 837:

> "While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

Were Lucas' parcels located on a glacier, on the slopes of an active volcano or astride an earthquake fault, there would be no question of any "right to build." The result would be the same were the property located on an active river floodplain or an unstable hillside, there would be no question of a "right to build" at all. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 739 (5th Cir. 1988) [floodplain]; *Maple Leaf Investors v. State Dept. of Ecology*, 88 Wash. 2d 726, 565 P.2d 1162 (Wash. 1977). By denying the right to place improvements on such land the government does not "take" property; it merely confirms the limitations placed by nature. It is true that in doing so, the government may impose its judgment regarding safety and the severity of natural conditions over that of the property owner. This however, is a proper function of government and, if exercised within the bounds of reason, does not violate the Fifth Amendment.

The risks of construction on petitioner's property may also be less self-evident than in other situations. However, petitioner has nowhere challenged the state legislature's findings or conclusions, contended that the setback line is improperly drawn with respect to his property, nor provided evidence which would allow a summary override of the legislature's conclusions. In a proper case, an individual in Lucas' shoes might be able to establish that the legislature's judgments were utterly contrary to established scientific evidence, or wholly inapplicable to his property. Here, however, petitioner has provided no basis for challenging the government's "unquestioned authority" (*Keystone*, 480 U.S. 470, 511) to establish and enforce safety standards for its citizens.

e. An otherwise unreasonable use of land need not be permitted solely to preserve a market value.

Petitioner poses the issue whether the State may *ever* deprive his land of all "value," meaning, presumably market value, without paying compensation, regardless of its purpose. Petitioner also appears to suggest that any property for which he paid several hundred thousand dollars simply cannot come within the nuisance exception.

If it comes down to it, *Amici* believe that the nuisance exception does permit government to extinguish all "economic" value in a piece of land, if it is marketable for no use which does not pose a serious risk of harm to its owner or others. Examples of hazardous property abound in nature. Government cannot be barred from restraining unsafe development of such properties simply so that the owner may market it to the adventurous.

More fundamentally, however, this is not a case in which all "value" has been denied. Petitioner errs in equating the right of ownership and reasonable use — which the Fifth Amendment clearly protects — with economic or market value. To be sure, market value is the commonest measure of property value, for reasons long-ago stated in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1949). However, market or economic value is ultimately merely an indicator of value, not value itself. Certainly the absence of any ascertainable market value does not relieve the government from paying just compensation where value exists. Neither does the absence of market value necessarily and automatically indicate that government regulations have gone "too far." This merely begs the questions of what uses — marketable or

otherwise — remain, and whether the restrictions are excessive in terms of what uses of the property are reasonable to begin with. For reasons already stated, the uses desired by petitioner may be deemed unreasonable by the State.

Any argument based on economic value ultimately proves too much. Certainly the market is capable of creating a value for virtually any attractive property, with the price set by discounting attractiveness with risk. Lucas' experience indicates that there certainly may be a market for risky properties, and one suspects that there would remain a market (albeit a lower price) for Lucas' property were it located 30 feet instead of 300 feet from the present high water mark. However, the Constitution permits the State to abolish a market where none ought to exist. *See, e.g., Mugler*, 123 U.S. 623, 663. This principle must apply to real property as any other. Indeed, Lucas' situation resembles none so much as that of the owner in *Andrus*, 444 U.S. 51, who was left with the right to possess and enjoy, but not to resell his property.

C. The State's Prohibition On Building Within An Area Subject To Major Storm Damage and Beach Erosion Falls Within The Nuisance Exception.

All elements necessary to support application of the "nuisance exception" are present in this case. The state legislature reasonably determined that the band of shoreline property which includes petitioner's parcels is subject to natural forces which make construction of permanent dwellings unsafe. Petitioner has not challenged the legislative judgment on this matter; indeed, he has conceded the validity of the regulations. It may be that Lucas can

obtain an exception under the provisions of the act as amended in 1990; *Amici* do not contend that the government must forbid unwise uses of land, but only that it may. Petitioner has not shown that the State's initial determination, however, was arbitrary, unreasonable, or beyond the proper bounds of government's authority to protect public and private safety.

D. The Legislative Branch Of Government Is Properly Charged With the Primary Authority To Determine Which Uses of Land Are Unreasonably Hazardous Or Injurious To The Public To Merit Prohibition.

It must be acknowledged that the "nuisance exception" is a limited doctrine, and one which is potentially subject to abuse. Clearly the "nuisance exception" is not "coterminous with the police power itself." *Keystone*, 480 U.S. 470, 512 (Rehnquist, dissenting). The question remains as to which branch of government — the legislative or judicial — has the principle authority to determine which uses of property are sufficiently unsafe or injurious that they transcend the bounds of reasonable use of property.

1. Determination of Unsafe or Unreasonably Injurious Uses Has Traditionally Been a Matter for the Legislative Branch.

This Court has historically granted the legislative branch of government the primary role in defining which harms or ill effects are sufficiently substantial and detrimental as to justify actual prohibition. In *Mugler*, for example, this Court noted:

> "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." *Mugler*, 123 U.S. 623, 668-669.

Since *Mugler*, this Court has often restated the importance of deference to legislative judgments in matters affecting the public health and welfare. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392-393 (1926); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Agins v. Tiburon*, 447 U.S. 255, 261 (1980); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 55-56 (1976); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 53 (1986). The same considerations underlying these decisions remain valid today.

2. The Legislative Branch Is Better Equipped to Conduct Necessary Factual Inquiries and Establish Public Safety Standards.

The legislative branch is far better equipped to gather, weigh and balance scientific, historical and other factual data than the court system, which is bound by the narrow spectrum of facts presented to it by advocates of varying means and intentions. This case illustrates the wisdom of this policy. There appears no question that the legislative decision to establish setback lines came in the wake of lengthy consideration of available scientific and historical data, and hard consideration of alternatives. There is no reason to believe that property owners or other citizens adversely affected were deprived of the opportunity

to fully present their competing interpretations of scientific facts and realities.

The question of what is unreasonably hazardous or unreasonably injurious to others is also inherently a matter of policy judgment as well as factual considerations. Clearly these questions are properly the province of the legislature rather than the courts. Opinions may differ, for example, as to whether homes should be permitted in a zone subject to catastrophic flooding once every 100 years, or whether owners should be entitled to risk floods occurring at a frequency of every 50 years. Similar considerations are involved in determining how far homes must be set back from an active earthquake fault, an unstable cliff, or — as in this case — an active beach. Clearly this is not a question which can be left to case by case resolution in the trial courts, nor is it a matter on which the courts are equipped or intended to resolve policy for society.

3. Case by Case Adjudication Cannot Be Substituted for Legislative Judgment.

The facts of this case confirm the pitfalls of entrusting plenary review powers in the courts. There was, and is, no claim that the State's objectives were unreasonable, or that the building setback line was arbitrary or unsuited for its purposes in light of applicable scientific principles. Nevertheless, the trial court apparently felt that the Fifth Amendment entitled it to conduct an entirely independent judgment on validity of the State's concerns.

At trial petitioner relied almost exclusively on the fact that his property is *currently* well removed (approximately 310 feet) from the highwater line, and that the area historically is accreting rather than eroding. In addition, Lucas offered his personal opinion that he

considered the risk of selling or building on the property acceptable. In reply, the State produced unrebutted expert testimony that the shoreline is inherently unstable; that major erosional events are to be expected and that these events may erode the shoreline by as much as 300 feet in an episode; that petitioner's property was under water as recently as 1963 and nearby properties were damaged by wave action in 1983; and that there are no assurances that petitioner's property is safe. The historic accretion process relied upon by petitioner is very much a case of two steps forward, one step back, and the backward steps may be sufficient to endanger petitioner's property. Despite the evidence, the trial court concluded that petitioner's two parcels were "suitable" for development. There is no analysis of the actual facts regarding risk to the property.

Another trier of fact might well have found that the State plainly established a reasonable basis for regulation. Ultimately the Atlantic Ocean, and neither the legislature nor the courts, nor individual property owners, will determine whether Mr. Lucas' property remains "suitable" for a home. But neither the government's power to establish safety standards nor application of the Fifth Amendment can be made to depend on hindsight.

4. The Courts May Prevent Abuse of the "Nuisance" Doctrine Through Traditional Review of Legislative Judgment.

Certainly private owners should not be without remedy against unreasonable government regulation. But a remedy exists. The courts retain authority to override legislative dictates that are arbitrary, capricious or entirely lacking in factual basis. This rule applies equally to any

attempt by the government to label as unsafe or injurious that which, in the light of scientific fact, is not. In this case, the Court need not consider whether concerns beyond those traditionally recognized by the "nuisance exception" may justify a ban on permanent construction. It may be assumed that regulations which further only considerations less pressing than health, safety or (perhaps) the conservation of essential public resources remain subject to the traditional analysis stated in past cases.[4] The remedy, however, does not lie in merely showing a deprivation of use, without any showing that the deprivation is beyond the scope of the government's power to protect health and safety.

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[4] *Amici* do reject any argument that the "nuisance exception" may be defined exclusively by past case law. *See, e.g., Keystone*, 480 U.S. 470, 512 (Rehnquist, dissenting). Past adjudication is relevant, but cannot provide the exclusive answer.

It must be acknowledged that both social values and scientific understanding are subject to change. As the principles of geological and ecological causation become better understood, it is inevitable that activities once thought benign may be discovered to be the actual root of significant harms. Advances in the field of medicine, for example, have vastly expanded our field of understanding, and correspondingly provided grounds for regulation of many activities previously thought harmless. In the field of geology and ecology, results once thought inevitable and unavoidable consequences of natural processes may be traced to man-caused roots.

Adjudication follows rather than precedes the development of knowledge as a whole. The conception of "nuisance" cannot be made to rest on past decisions alone. The Legislature's prerogative — perhaps duty would be a closer description — to prohibit damaging uses of property is not abated because the harm is a new one, or the regulations based on a more modern understanding of natural cause and effect. Such exercises of the police power do not require the payment of compensation any more now than they did 100 years ago.

II.

THE STATE'S ACTIONS HERE DID NOT AMOUNT TO A TAKING, PERMANENT OR TEMPORARY, OF LUCAS' PROPERTY, EVEN IF IT IS DETERMINED THAT THE LOCATION OF THE INTERIM SETBACK LINE ON LUCAS' PROPERTY WAS INAPPROPRIATE

If the Court determines that the State's actions were not immune under the "nuisance exception," it must still determine whether the State's actions amounted to a taking. *Amici* believe that in view of the totality of considerations, there was no taking.

A. No Permanent Taking Has Occurred; Lucas Can Apply For A Variance.

While a regulatory misstep may require the government to pay "just compensation," the Fifth Amendment does not require the government to become an involuntary substitute for the free market. In *First English*, 482 U.S. 304, this Court made it clear that the remedy for government overregulation is not an automatic involuntary purchase (or, from the owner's perspective, forced sale) of the property. "Once a court determines that a taking has occurred the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. The state statutes in this case specifically provided the state coastal council with the authority to issue a building permit to Lucas upon a finding that a taking had occurred as a result of application of the setback regulations. App. 132, § 48-39-305(B).

Subsequent to the trial the State further enacted a formal administrative variance procedure which would permit Lucas, and others similarly situated, to apply for development approval. App. 125, § 48-39-290(D). Until this permit procedure has been utilized there has been no permanent taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985); *Williamson County v. Hamilton Bank*, 473 U.S. 172, 185-186 (1985).

Plainly no permanent taking occurred in this case.

B. On The Facts Presented There Was No Temporary Taking.

In view of the 1990 amendments to the state coastal act, the dissenting justices of the South Carolina Supreme Court would have affirmed the alleged "taking" in this case, and remanded the matter to the state coastal council for permit hearings. The majority did not consider the question of a "temporary taking." If the judgment is not affirmed in its entirety, the appropriate course of action would appear to be a remand for consideration of this issue. Such a recommendation is included in the brief of the Solicitor General.

However, *Amici* believe that this Court may find that there was in fact no temporary taking. The prohibition on development of Lucas' property was not lengthy. It endured for thirteen and one-half (13½) months, *i.e.*, from the July 1, 1988 effective date of the legislative restrictions until August 10, 1989, when Lucas prevailed in the trial court and the coastal council was vested with authority to issue him a building permit. Alternately, the restriction endured approximately two (2) years, *i.e.*, until 1990, when Lucas became entitled to apply for permits under the 1990 amendments to the state coastal act. Lucas bought one

property strictly for resale, and the other for his personal residence. There is no indication that the long-term property values have been damaged or that the net delay in developing or reselling the properties has seriously eroded Lucas' "investment backed expectations." *Amici* believe that these facts, considered in light of relevant circumstances, do not demonstrate a sufficiently serious interference with property rights as to amount to a taking.

1. A Temporary Interruption of Development Rights Does Not Automatically Create a Temporary Taking.

In *First English*, 482 U.S. 304, this Court made it clear that compensation must be paid for temporary as well as permanent takings of property. The Court, however, left open the question of when a "temporary" denial of use becomes a sufficiently serious interference with property rights as to become an actual taking.

Common sense suggests that an interruption of a day or a week does not amount to a taking. In *First English*, the Court specifically assumed, for purposes of decision, that "the Los Angeles County ordinances denied appellant all use of its property *for a considerable period of years. . . .*" *First English*, 482 U.S. 304, 322, emphasis added. The restrictions had in fact already been in place for over six years. *Id.* at 319. The Court also expressly excluded consideration of "the quite different questions which would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us." *Id.* at 321.

In *First English* this Court further stated that "'temporary' takings . . . which deny a landowner all use of

his property, *are not different in kind* from permanent takings . . ." suggesting that analysis of temporary takings requires assessment of the same factors (*i.e.*, character of the governmental regulation, economic impact, and impacts on "reasonable investment backed expectations") as an alleged permanent "taking." *Id.* at 318, emphasis added. Under such analysis, a temporary interruption of development does not automatically result in a temporary taking; the *duration* of challenged restrictions is simply one factor to be considered in assessing their overall impact. The lower courts have interpreted *First English* in precisely this manner. *See, e.g., Ziiber v. Town of Moraga*, 692 F.Supp. 1195, 1206 (N.D. Cal. 1988) [finding that 1½ year development moratorium was not a taking]. Under this analysis, the Court may also consider the character of the challenged regulations, *i.e.*, their legitimacy and purpose, as well as economic impact and disruption (if any) of "reasonable investment backed expectations."

Amici believe that the lower courts have been correct. The temporary prohibition on permanent development of petitioner's property is not *per se* a temporary taking, but must be evaluated on its facts. Duration and purpose of any temporary bar to development are significant in determining whether the government action rises to the level of a taking.

2. The Net Interference with Petitioner's Rights Was Insufficient to Amount to a Taking.

Given the undisputed legitimate purposes of the South Carolina act, the relatively short duration of the development prohibition, and the lack of any demonstrated permanent impact on the economic value of the land or

petitioner's investment backed expectations, the Fifth Amendment does not require the payment of compensation in this situation. A short term moratorium or interruption of development rights, incidental to otherwise valid and reasonable legislation, is not a sufficiently serious interference with property rights that "justice and fairness" require the payment of compensation. *Penn Central*, 438 U.S. 104, 125. Rather such interruptions, even if prompted by overcautious or overinclusive regulation, are among the "incidents of property ownership" which property owners may reasonably be required to bear.

Petitioner Lucas, of course, may feel that the state setback requirement was excessive, and therefore unreasonable, as applied to his particular property. This, however, does alter the basic character of the State's action. The record indicates that Lucas' property is removed, if at all, from the zone subject to storm and erosion damage only by recent, and not necessarily stable, accretions of sand. Even were the setback line deemed overcautious with respect to Lucas' property, it is clear that inclusion of Lucas' property results only from a lack of precision in the State's boundary setting. Such imprecision is unavoidable in any large scale regulatory program. To hold government strictly accountable for such errors of overinclusion would be to effectively stifle such programs, regardless of their overall validity or purpose. In other contexts this Court has recognized that some latitude must be afforded governmental agencies in delimiting precise boundaries. *Berman v. Parker*, 348 U.S. 26, 35-36. There is also no claim that the State's objectives here were illegitimate, that the means chosen for establishing the setback line were arbitrary, nor that the underlying problems addressed by the state legislation are anything short of compelling. As this

Court has stated in another context, government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. 50, 71. *Amici* believe that some similar indulgence is warranted where the government attempts to regulate in matters directly affecting public health and safety.

At best, Lucas lives on the margin of an area of unique and special concern, and an area in which special state regulation could be expected, and in fact existed when Lucas purchased his lots. The risk of temporary over-regulation is one which property owners — particularly those in Mr. Lucas' situation — may reasonably be asked to bear as an uncompensated "incident of ownership," so long as the overregulation is not unreasonably continued after the relevant facts are brought to the attention of government.

3. There Is No Indication of Substantial Economic Impacts or Destruction of Lucas' "Reasonable Investment Backed Expectations".

There is no evidence at this time that a 13 month (or two year) ban on development of Lucas' property will result in any permanent loss of value for the property. Indeed, the record suggests that the property has and will continue to appreciate in value. The record is also silent on loss of "reasonable investment backed expectations." There was no threat of confiscation. Lucas purchased one lot for resale, and acknowledged at trial that holding the property for some time would not harm him. South Carolina Supreme Court Transcript of Record, pp.28-29. There is no indication that any delay caused Lucas in building a personal home on his other lot, has worked a substantial

hardship. Given the nature of the restriction at issue — a ban on permanent construction — it is material whether Lucas' plans required him to make immediate use of the property, or whether he was prepared from the outset to permit the property to remain idle for a period of time. At best, Lucas might be entitled to submit evidence on these points on remand. However, it would appear more appropriate to hold that Lucas waived his claim to a temporary taking by failing to present evidence on this point at trial.

Given the actual character of the government regulations at issue, and the lack of demonstrated actual harm to Lucas, *Amici* submit that no taking occurred in this case.

CONCLUSION

For all the foregoing reasons, *Amici* submit that the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,
FREILICH, STONE, LEITNER & CARLISLE
By KATHERINE E. STONE
Counsel of Record for Amici

APPENDIX

APPENDIX OF AMICI

CAROL KORADE, CITY ATTORNEY
CITY OF ALAMEDA
2263 Santa Clara Avenue
Room 314
Alameda, CA 94501

JACK L. WHITE, CITY ATTORNEY
ELEANOR M. EGAN, SENIOR ASSISTANT CITY ATTORNEY
CITY OF ANAHEIM
200 South Anaheim
Boulevard, Suite 356
Anaheim, CA 92805

JUDY SKOUSEN, CITY ATTORNEY
CITY OF ARROYO GRANDE
895 Napa Street, Suite B-6
Post Office Box 834
Morro Bay, CA 93442

ROBIN D. FAISANT, CITY ATTORNEY
CITY OF ATHERTON
1550 El Camino Real
Menlo Park, CA 94025

GARY T. RAGGHIANTI, CITY ATTORNEY
CITY OF BELVEDERE
874 Fourth Street
San Rafael, CA 94901

MANUELA ALBUQUERQUE, CITY ATTORNEY
THOMAS B. BROWN, DEPUTY CITY ATTORNEY
CITY OF BERKELEY
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, CA 94704

F. THOMAS CAPOREAL, CITY ATTORNEY
CITY OF CALIMESA
Post Office Box 1190
Calimesa, CA 92320

RICHARD M. MANNING, CITY ATTORNEY
CITY OF CAPITOLA
420 Capitola Avenue
Capitola, CA 95010

RONALD R. BALL, ACTING CITY ATTORNEY
CITY OF CARLSBAD
1200 Carlsbad Village Drive
Carlsbad, CA 92008-1989

JIMMY L. GUTIERREZ, CITY ATTORNEY
CITY OF CHINO
12616 Central Avenue
Chino, CA 91710

BRUCE M. BOOGAARD, CITY ATTORNEY
CITY OF CHULA VISTA
276 Fourth Avenue
Chula Vista, CA 91910

LELAND D. STEPHENSON, CITY ATTORNEY
CITY OF CLOVIS
Post Office Box 1752
Fresno, CA 93717-1752

JIMMY L. GUTIERREZ, CITY ATTORNEY
CITY OF COACHELLA
12616 Central Avenue
Chino, CA 91710

WILLIAM CAMIL, CITY ATTORNEY
CITY OF COMMERCE
2535 Commerce Way
Commerce, CA 90040

THOMAS A. KATHE, CITY ATTORNEY
CITY OF COSTA MESA
77 Fair Drive
Post Office Box 1200
Costa Mesa, CA 92628

ROBERT WELLINGTON, CITY ATTORNEY
CITY OF DEL REY OAKS
857 Cass Street, Suite D
Monterey, CA 93940

DANIEL T. MCCLOSKEY, CITY ATTORNEY
CITY OF DINUBA
Tuttle & McCloskey
351 East Barstow, Suite 106
Freno, CA 93710

ALLEN E. SPRAGUE, CITY ATTORNEY
CITY OF FREMONT
39700 Liberty Street
Fremont, CA 94537

SCOTT H. HOWARD, CITY ATTORNEY
CITY OF GLENDALE
613 East Broadway
Suite 220
Glendale, CA 91206-4394

ROGER PICQUET, CITY ATTORNEY
CITY OF GROVER CITY
Post Office Box 922
San Luis Obispo, CA 93406

GAIL C. HUTTON, CITY ATTORNEY
JOSEPH BARRON, DEPUTY CITY ATTORNEY
CITY OF HUNTINGTON BEACH
2000 Main Street
Post Office Box 2740
Huntington Beach, CA 92647

DAVID J. ERWIN, CITY ATTORNEY
CITY OF INDIO
Best, Best & Krieger
39-700 Bob Hope Drive
Suite 312
Rancho Mirage, CA 92270

LELAND D. STEPHENSON, CITY ATTORNEY
CITY OF KINGSBURG
Post Office Box 1752
Fresno, CA 93717-1752

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF LAFAYETTE
2530 Arnold Drive
Suite 360
Martinez, CA 94553

JOHN CALHOUN, CITY ATTORNEY
CITY OF LONG BEACH
333 West Ocean Boulevard
Long Beach, CA 90802

ROBERT K. BOOTH, JR., CITY ATTORNEY
CITY OF LOS ALTOS
One North San Antonio Road
Los Altos, CA 94022

JAMES K. HAHN, CITY ATTORNEY
ANTHONY S. ALPERIN, ASSISTANT CITY ATTORNEY
CITY OF LOS ANGELES
200 North Main Street
City Hall East Room 1800
Los Angeles, CA 90012

ROBERT WELLINGTON, CITY ATTORNEY
CITY OF MARINA
857 Cass Street, Suite D
Monterey, CA 93940

M. DWAIN SMITH, CITY ATTORNEY
CITY OF MCFARLAND
1120 Kensington Street
Delano, CA 93215

LELAND H. JORDAN, CITY ATTORNEY
CITY OF MILL VALLEY
47 Skyview Terrace
San Rafael, CA 94903

WILLIAM B. CONNERS, CITY ATTORNEY
CITY OF MONTEREY
City Hall
Monterey, CA 93940

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF MORAGA
2530 Arnold Drive
Suite 360
Martinez, CA 94553

JUDY SKOUSEN, CITY ATTORNEY
CITY OF MORRO BAY
895 Napa Street, Suite B-6
Post Office Box 834
Morro Bay, CA 93442

JOHN L. COOK, CITY ATTORNEY
CITY OF NAPA
955 School Street
Post Office Box 660
Napa, CA 94559-0660

JAYNE WILLIAMS, CITY ATTORNEY
CITY OF OAKLAND
505 Fourteenth Street
Suite 1200
Oakland, CA 94612

DANIEL T. MCCLOSKEY, CITY ATTORNEY
CITY OF ORANGE COVE
TUTTLE & MCCLOSKEY
351 East Barstow
Suite 106
Freno, CA 93710

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF ORINDA
2530 Arnold Drive
Suite 360
Martinez, CA 94553

CHARLES LUEDER, CITY ATTORNEY
CITY OF OROVILLE
2060 Third Street
Oroville, CA 95965

GARY L. GILLIG, CITY ATTORNEY
CITY OF OXNARD
300 West Third Street
Oxnard, CA 93030-5790

SUSAN SCHECTMAN, CITY ATTORNEY
CITY OF PACIFICA
170 Santa Maria Avenue
Pacifica, CA 94044

DAVID J. ERWIN, CITY ATTORNEY
CITY OF PALM DESERT
Best, Best & Krieger
39-700 Bob Hope Drive
Suite 312
Rancho Mirage, CA 92270

DAVID J. ALESHIRE, CITY ATTORNEY
CITY OF PALM SPRINGS
Rutan and Tucker
611 Anton Boulevard
Suite 1400
Costa Mesa, CA 92628

GEORGE S. PEYTON, JR., CITY ATTORNEY
CITY OF PIEDMONT
1999 Harrison Street
Oakland, CA 94612

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF PITTSBURG
2530 Arnold Drive
Suite 360
Martinez, CA 94553

CAROL B. TANENBAUM,
CITY ATTORNEY
CITY OF PLACENTIA
401 East Chapman
Placentia, CA 92670

DAVE LARSEN, CITY
ATTORNEY
CITY OF PLEASANT HILL
100 Gregory Lane
Pleasant Hill, CA 94523

MICHAEL ROUSH, CITY
ATTORNEY
DENNIS BEOUGHER,
ASSISTANT CITY
ATTORNEY
CITY OF PLEASANTON
123 Main Street
Post Office Box 520
Pleasanton, CA 94566

DON G. KIRCHER, CITY
ATTORNEY
CITY OF PORT HUENEME
BURKE, WILLIAMS &
SORENSON
2310 E. Ponderosa Drive
Suite 1
Camarillo, CA 93010

JEAN LEONARD HARRIS,
CITY ATTORNEY
CITY OF RANCHO MIRAGE
69-825 Highway 111
Rancho Mirage, CA 92270

RANDALL A. HAYS, CITY
ATTORNEY
CITY OF REDDING
760 Parkview Avenue
Redding, CA 96001-3396

JOHN WOODHEAD, CITY
ATTORNEY
CITY OF RIVERSIDE
3900 Main Street
Riverside, CA 92522

MICHAEL F. DEAN, CITY
ATTORNEY
CITY OF ROSEVILLE
311 Vernon Street
Roseville, CA 95678

SHARON SIEDORF
CARDENAS,
CITY ATTORNEY
CITY OF SACRAMENTO
921 Tenth Street
Suite 700
Sacramento, CA 95814-
2717

JOHN W. WITT, CITY
ATTORNEY
C. ALAN SUMPTION, CHIEF
DEPUTY CITY
ATTORNEY
CITY OF SAN DIEGO
525 "B" Street
Suite 2100
San Diego, CA 92101

JOAN GALLO, CITY
ATTORNEY
GEORGE RIOS, ASSISTANT
CITY ATTORNEY
CITY OF SAN JOSE
151 West Mission Street
San Jose, CA 95110

JEFFREY G. JORGENSEN,
CITY ATTORNEY
CITY OF SAN LUIS OBISPO
990 Palm Street
Post Office Box 8100
San Luis Obispo, CA 93403

DANIEL S. HENTSCHKE,
CITY ATTORNEY
CITY OF SAN MARCOS
BROWN, DIVEN &
HENTSCHKE
12770 High Bluff Drive
Suite 240
San Diego, CA 92130

GARY T. RAGGHIANTI,
CITY ATTORNEY
CITY OF SAN RAFAEL
874 Fourth Street
San Rafael, CA 94901

ARTHER R. MONTANDON,
CITY ATTORNEY
CITY OF SANTA MARIA
110 East Cook Street
Santa Maria, CA 93454

ROBERT M. MYERS, CITY
ATTORNEY
JOSEPH LAWRENCE,
ASSISTANT
CITY ATTORNEY
CITY OF SANTA MONICA
1685 Main Street
Room 310
Santa Monica, CA 90401

DAVID J. ALESHIRE, CITY ATTORNEY
CITY OF SIGNAL HILL
RUTAN AND TUCKER
611 Anton Blvd., Ste 1400
Costa Mesa, CA 92628

DANIEL S. HENTSCHKE, CITY ATTORNEY
CITY OF SOLANA BEACH
BROWN, DIVEN & HENTSCHKE
12770 High Bluff Drive
Suite 240
San Diego, CA 92130

DENNIS CRABB, CITY ATTORNEY
CITY OF SOUTH LAKE TAHOE
1052 Tata Lane
South Lake Tahoe, CA 96150-6324

MICHAEL J. O'TOOLE, CITY ATTORNEY
CITY OF SOUTH SAN FRANCISCO
315 Maple Avenue
South San Francisco, CA 94080

M. DWAIN SMITH, CITY ATTORNEY
CITY OF TEHACHAPI
1120 Kensington Street
Delano, CA 93215

PETER BULENS, CITY ATTORNEY
CITY OF VENTURA
501 Poli Street
Ventura, CA 93002

THOMAS HAAS, CITY ATTORNEY
PAUL M. VALLE-RIESTRA, ASSISTANT CITY ATTORNEY
CITY OF WALNUT CREEK
1666 North Main Street
Post Office Box 8039
Walnut Creek, CA 94596

ROBERT JOEHNCK, CITY ATTORNEY
CITY OF WHEATLAND
7430 Morningside Drive
Loomis, CA 95650

DAVID NAWI, COUNTY COUNSEL
SHANE STARK, CHIEF DEPUTY COUNTY COUNSEL
COUNTY OF SANTA BARBARA
105 East Anapamu Street
Santa Barbara, CA 93101

M. NEAL SINGER, TOWN ATTORNEY
TOWN OF APPLE VALLEY
Singer & Silvergleid
3750 University Avenue,
Suite 550
Riverside, CA 92501

LELAND H. JORDAN, TOWN ATTORNEY
TOWN OF FAIRFAX
47 Skyview Terrace
San Rafael, CA 94903

ROBERT JOEHNCK, TOWN ATTORNEY
TOWN OF LOOMIS
7430 Morningside Drive
Loomis, CA 95650

HADDEN ROTH, TOWN ATTORNEY
TOWN OF ROSS
Roth, Curtin & DeCuir
1050 Northgate Drive
Suite 354
San Rafael, CA 94903

HADDEN ROTH, TOWN ATTORNEY
TOWN OF SAN ANSELMO
Roth, Curtin & DeCuir
1050 Northgate Drive
Suite 354
San Rafael, CA 94903

ROBERT B. EWING, TOWN ATTORNEY
TOWN OF TIBURON
1155 Tiburon Boulevard
Tiburon, California 94920

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on January 31, 1992, I served the within *Brief Of California Cities and Counties As Amici Curiae In Support Ross Of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Express Mail: original and forty copies)

C.C. Harness, III, General Counsel
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, South Carolina 29405
(803) 744-5838
Attorney for Respondent
South Carolina Coastal Council

A. Camden Lewis, Esq.
Lewis, Babcock & Hawkins
1513 Hampton Street
P. O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorneys for Petitioner
David H. Lucas

Gerald M. Finkel, Esq.
Finkel, Goldberg, Sheftman & Altman
P. O. Box 1799
Columbia, South Carolina 29211

David J. Bederman, Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

Kenneth W. Starr, Solicitor General
Barry M. Hartman, Acting Ass't. Attorney General
Lawrence G. Wallace, Deputy Solicitor General
Roger Clegg, Deputy Ass't. Attorney General
Benedict S. Cohen, Acting Deputy Ass't. Attorney General
Edwin S. Kennedler, Ass't. to the Solicitor General
Peter R. Steenland
James E. Bryson
Martin W. Matzen
Department of Justice
Washington, D. C. 20530
(202) 514-2217
Attorneys for United States

Ronald A. Zumbrun
Edward J. Connor, Jr.
Timothy V. Kassouni
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
(916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 31, 1992, at Los Angeles, California.

Betty J. Malloy
(Original signed)

LIST OF AMICI CONTINUED

William B. Conners, City Attorney
City of Monterey

Charles J. Williams, City Attorney
City of Moraga

Judy Skousen, City Attorney
City of Morro Bay

John L. Cook, City Attorney
City of Napa

Jayne Williams, City Attorney
City of Oakland

Daniel T. McCloskey, City Attorney
City of Orange Cove

Charles J. Williams, City Attorney
City of Orinda

Charles Lueder, City Attorney
City of Oroville

Gary L. Gillig, City Attorney
City of Oxnard

Susan Schectman, City Attorney
City of Pacifica

David J. Erwin, City Attorney
City of Palm Desert

David J. Aleshire, City Attorney
City of Palm Springs

George S. Peyton, Jr., City Attorney
City of Piedmont

Charles J. Williams, City Attorney
City of Pittsburg

Carol B. Tanenbaum, City Attorney
City of Placentia

Dave Larsen, City Attorney
City of Pleasant Hill

Michael Roush, City Attorney
Dennis Beougher, Assistant City Attorney
City of Pleasanton

Don G. Kircher, City Attorney
City of Port Hueneme

Jean Leonard Harris, City Attorney
City of Rancho Mirage

Randall A. Hays, City Attorney
City of Redding

John Woodhead, City Attorney
City of Riverside

Michael F. Dean, City Attorney
City of Roseville

Sharon Siedorf Cardenas, City Attorney
City of Sacramento

John W. Witt, City Attorney
C. Alan Sumption, Chief Deputy City Attorney
City of San Diego

Joan Gallo, City Attorney
George Rios, Assistant City Attorney
City of San Jose

Jeffrey G. Jorgensen, City Attorney
City of San Luis Obispo

Daniel S. Hentschke, City Attorney
City of San Marcos

Gary T. Ragghianti, City Attorney
City of San Rafael

Arther R. Montandon, City Attorney
City of Santa Maria

Robert M. Meyers, City Attorney
Joseph Lawrence, Assistant City Attorney
City of Santa Monica

(LIST OF AMICI CONTINUED ON BACK OUTSIDE COVER)

LIST OF AMICI CONTINUED

David J. Aleshire, City Attorney
City of Signal Hill

Daniel S. Hentschke,
City Attorney
City of Solana Beach

Dennis Crabb, City Attorney
City of South Lake Tahoe

Michael J. O'Toole, City
Attorney
City of South San Francisco

M. Dwain Smith, City Attorney
City of Tehachapi

Peter Bulens, City Attorney
City of Ventura

Thomas Haas, City Attorney
Paul M. Valle-Riestra, Assistant
City Attorney
City of Walnut Creek

Robert Joehnck, City Attorney
City of Wheatland

David Nawi, County Counsel
Shane Stark, Deputy County Counsel
County of Santa Barbara

M. Neal Singer, Town Attorney
Town of Apple Valley

Leland H. Jordon, Town
Attorney
Town of Fairfax

Robert Joehnck, Town Attorney
Town of Loomis

Hadden Roth, Town Attorney
Town of Ross

Hadden Roth, Town Attorney
Town of San Anselmo

Robert B. Ewing, Town
Attorney
Town of Tiburon